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#### UNITED STATES OF AMERICA

### BEFORE THE NATIONAL LABOR RELATIONS BOARD

### REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT,	CASE NOS.:	37-CA-7311 37-CA-7334
LLC, a SINGLE EMPLOYER, dba PACIFIC		37-CA-7422
BEACH HOTEL,		37-CA-7448
		37-CA-7458
Respondents,		37-CA-7476
		37-CA-7478
and		37-CA-7482
and		37-CA-7484 37-CA-7488
		37-CA-7488 37-CA-7537
:		37-CA-7550
HTH CORPORATION dba PACIFIC BEACH HOTEL,		37-CA-7587
and	CASE NO.:	37-CA-7470
KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL,		
and	CASE NO.:	37-CA-7472
PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL,		

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,

Union.

CASE NO.:

37-CA-7473

RESPONDENTS' REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION; CERTIFICATE OF SERVICE

Hearing:

Judge:

James Kennedy

Date:

November 4-12, 2008

February 19-27, 2009

Time:

9:00 a.m

# RESPONDENTS' REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

This Reply Brief responds to several factual and legal errors found in the Counsel for the General Counsel's Answering Brief:

First, this reply brief explains how the Counsel for the General Counsel has now changed its arguments regarding whether and how Respondents should be liable for the pending unfair labor practices in this case. Specifically, Counsel for the General Counsel previously argued that Respondents should be liable for such unfair labor practice charges because they were in a joint-employer, principle-agent, or successor employer relationship with Pacific Beach Hotel Management ("PBHM"), an entity that operated the Pacific Beach Hotel in 2007. Now that the Administrative Law Judge has failed to find that Respondents were a joint-employer, principle-agent, or successor employer with PBHM, Counsel for the General Counsel makes the tenuous argument that Respondents should be liable for the pending unfair labor practices as the "true and therefore continuous" employer of the Hotel employees. This argument, aside from being post-facto, is completely without merit and should be rejected.

Second, this reply brief also argues that testimony of certain Hotel employees regarding the union sentiments of the majority of the other employees at the Hotel was wrongfully excluded from the record in this case. Third, this brief argues that the Counsel for the General Counsel has misapplied the "totality of circumstances" standard for collective bargaining. Finally, this brief argues that a one-year extension of certification in this case is unwarranted, and indeed, ill-advised.

I. The Pending Unfair Labor Practice Charges Must Be Dismissed Because Respondents Were Not Found To Be In A Joint-Employer, Principle-Agent, Or Successor Employer Relationship with PBHM

<sup>&</sup>lt;sup>1</sup> The majority of unfair labor practice charges in this case are from 2007.

All but two of the unfair labor practices charged against Respondents in this case are alleged to have occurred at the Pacific Beach Hotel in 2007 (the other two allegedly occurred in 2008). This fact is significant, because Respondents were not the employer of the employees at Pacific Beach Hotel during that time. Rather, PBHM, which operated the hotel from January 1 through November 2007, was the employer.

Therefore, in an attempt to hold Respondents responsible for the unfair labor practices that allegedly occurred in 2007, the Counsel for the General Counsel tried to pin the unfair labor practices onto Respondents under three alternative theories of liability. Specifically, the Counsel for the General Counsel argued that Respondents were liable for the unfair labor practices because they were (a) a joint-employer with PBHM during the time period in question; (b) in a principle-agent relationship with PBHM during that time period; or (c) a successor employer to PBHM as of December 1, 2007. Under these theories of liability, the unfair labor practices in this case relied upon a finding that Respondents fell into one of the three categories above.

From the very outset of this case (until just recently), the Counsel for the General Counsel made it abundantly clear that it was pursuing the unfair labor practices against Respondents under these three alternative theories of liability, and *only* under these three theories of liability. In fact, the Counsel for the General Counsel repeated these three theories of liability on several occasions and in multiple formats. To start, the Complaint, which gave rise to these proceedings, separated the unfair labor practice charges under the different theories of employer liability. The Complaint also specifically stated that some unfair labor practice charges relied upon a finding of joint-employer or principle-agent status, while other unfair labor practice charges relied upon a finding of a successor employer status. See General Counsel's Exhibit Ivvvv (hereinafter "GC \_\_."). Thereafter, during the opening statements for the hearing in this

matter, the Counsel for the General Counsel stated that they were seeking to hold Respondents responsible for the unfair labor practice charges under one of the three alternative theories of liability mentioned above. See Transcript of Proceedings at 28-29 (hereinafter "Tr. at \_\_."). Finally, the Counsel for the General Counsel's post-hearing brief also stated that certain unfair labor practices relied upon a finding of joint-employer, principle-agent, or successor employer status.

The Counsel for the General Counsel never proffered a fourth theory of liability, and therefore, the pending unfair labor practices relied, and were dependent, upon a finding that Respondents fell within one of the three theories of employer liability. In other words, if the Administrative Law Judge ("ALJ") did not find that Respondents were in a joint-employer, principle-agent, or successor employer relationship with PBHM, the unfair labor practice charges that fall under that particular theory of liability must be rejected.

As hindsight is surely 20/20, it appears the Counsel for the General Counsel did not realize the potentially fatal flaw it had in its case, until now. Specifically, the ALJ Decision did not find Respondents to be in a joint-employer, principle-agent, or successor employer relationship with PBHM and all unfair labor practices that relied upon such a finding must be dismissed. Realizing that the Judge's failure to make such a finding is now fatal to its case, the Counsel for the General Counsel has changed its tune and is now arguing that it doesn't matter that it did not establish Respondents were in a joint-employer, principle-agent, or successor employer relationship with PBHM, because the ALJ found Respondents were the "true, and therefore continuous, employer" of the hotel employees during the time period in question. Not only does this new proposition by the Counsel for the General Counsel blatantly put words into

the ALJ's Decision, it also reveals that the Counsel for the General Counsel is now painfully aware of the fatal flaws they had in their case against Respondents.

Specifically, the Counsel for the General Counsel appears to be heavily relying on a single sentence on page 17 of the ALJ Decision that states Respondents were "in fact the true employer of the hotel staff." The Counsel for the General Counsel's reliance on this statement to argue that the ALJ found Respondents to be the "true, and therefore continuous, employer" is troubling and misguided for several reasons. First, nowhere in this statement or the rest of the Decision does the ALJ refer to Respondent as the "true, and therefore continuous" employer of the employees. The Counsel for the General Counsel inserted the words "and therefore continuous" on its own. Second, while this statement by the ALJ appears in the background portion of the ALJ Decision, it is conspicuously missing from the "Conclusory Findings" or "Conclusions of Law" sections of the Decision. Third, the ALJ's Decision is somewhat confusing, because he also refers to PBHM as the "true employer" or "direct employer" in other portions of his Decision. See Decision at 20:34-36 and 42:19-20.

Clearly, contrary to the Counsel for the General Counsel's assertions, the ALJ did not unequivocally find Respondents to be the "true employer" and definitely did not find Respondents to be the "true and therefore continuous employer." Therefore, by pinning their new argument on a single sentence found in the background section of the ALJ's Decision, the Counsel for the General Counsel is grasping at straws in an effort to salvage its case against Respondents. Unfortunately for the Counsel for the General Counsel, their new argument is meritless and should be rejected.

<sup>&</sup>lt;sup>2</sup> The Counsel for the General Counsel actually cited to page 16:19-20, but the correct citation would be page 17:19-20. Curiously, the Union's Answering Brief contained the <u>same exact argument</u> as the Counsel for the General Counsel's Brief – i.e. Respondents were the "true" employer – and also had the <u>same exact mistake</u>. The Union also incorrectly cited to page 16:19-20 in its brief.

First, the pending unfair labor practices in this case relied upon a finding that Respondents were a joint-employer, principle-agent, or successor employer with PBHM. The ALJ never made such a finding. Throughout this entire matter, the Counsel for the General Counsel made it abundantly clear that the pending unfair labor practices relied upon a finding of one of the three proffered theories of liability. Specifically, the language and format of the Complaint and Counsel for the General Counsel's post-hearing brief are very telling and beg the question: If the unfair labor practices were not dependent upon a finding of joint-employer, principle-agent, or successor employer status, why plead alternative theories in the first place? Similarly, if it truly was not necessary to find Respondents to be a joint-employer with PBHM, why did the Counsel for the General Counsel also proffer its successor employer theory of liability? The fact is that by pursuing this strategy, the Counsel for the General Counsel made it clear that they realized they needed an alternative to the joint-employer theory, and so they also pursued the successor employer theory of liability. In other words, they had a back up plan if the joint-employer theory fell through – they would get Respondents as a successor. Unfortunately for the Counsel for the General Counsel, they had no back up plan if Respondents were found to be neither a joint-employer nor a successor, which is exactly what happened in this case.

Second, as noted, the Counsel for the General Counsel's argument that the ALJ found Respondents to be the "true and therefore continuous" employer is a blatant distortion of the ALJ's Decision. The ALJ's Decision contains no such conclusory finding or conclusion of law.

Third, even assuming arguendo the ALJ found Respondents to be the "true" employer, the Counsel for the General Counsel never proffered this fourth-theory of employer liability for the pending unfair labor practices. Therefore, such a post-factum argument should be rejected.

Finally, the Counsel for the General Counsel has made the completely tenuous argument that Respondents' exceptions should be denied because "Respondents have not specifically excepted to the lack of an ALJ finding on a joint-employer or agency relationship" with PBHM. Of course Respondents did not take exception to the ALJ's lack of finding a joint-employer or agency relationship with PBHM. During the entire proceeding, Respondents argued that they were *not* in a joint-employer or principle-agent relationship with PBHM. Therefore, the ALJ's inability to find a joint-employer or principle-agent relationship meant the ALJ *agreed* with Respondents and this finding *supports* Respondents' arguments that all unfair labor practice charges that rely upon a finding of joint-employer or principle-agent relationship between Respondents and PBHM should be dismissed. Simply put, just as the ALJ's inability to find a joint-employer or principle agent relationship between Respondents and PBHM was fatal to the Counsel for the General Counsel's case, it was a good result for Respondents.<sup>3</sup>

### II. The Judge Erroneously Excluded Pertinent And Relevant Evidence From The Proceedings Regarding The Employees' Distaste For The Union

The Counsel for the General Counsel went to great lengths to argue that the Judge properly excluded evidence from several hotel employees who would have testified that the majority of hotel employees did not want to be represented by the Union because they felt the Union was doing more harm to them than good. The Counsel for the General Counsel also made the argument that such evidence would not constitute the type of "unusual circumstances" that would permit an employer to rely upon a post-withdrawal petition from employees to cease to recognize a union. The Counsel for the General Counsel, however, made such an argument

<sup>&</sup>lt;sup>3</sup> The Counsel for the General Counsel's arguments become even more tenuous after reviewing its own cross-exceptions, which include an exception to the ALJ's failure to find Respondents were in a principle-agent relationship with PBHM. Clearly, the Counsel for the General Counsel cannot dispute that a lack of finding of joint-employer, principle-agent or successor employer status is fatal to its case.

despite the fact that such evidence was never admitted into the record in the first place. Such a position is completely contrary to Board law.

First, the Counsel for the General Counsel has clearly acknowledged that there may be "unusual circumstances" that would permit an employer to rely upon a post-withdrawal petition to cease recognition of a union. Therefore, they are not arguing that Respondent's legal position is incorrect; they are simply saying the evidence Respondent's wanted to submit would have been insufficient to establish a finding of "unusual circumstances." Such a preclusionary argument must be rejected.<sup>4</sup>

Specifically, it is important to note that the concept of "unusual circumstances" has been applied in several different situations. While the Counsel for the General Counsel correctly noted that the Court in *Ray Brooks v. NLRB*, 348 U.S. 96 (1954), listed three examples of "unusual circumstances," it was incorrect for them to argue that the examples listed in *Ray Brooks* are binding on the present case. Rather, as the Board noted in *Universal Enterprises*, *Inc.*, 291 NLRB 670 (1988):

The concept of unusual circumstances cannot be precisely defined in a manner that is readily applicable to all situations. Rather, a determination of the presence or absence of unusual circumstances is dependent upon an examination of the facts of each case viewed in light of the parties' bargaining conduct and the impact that this conduct may have on the continued viability of multiemployer contract negotiations.

The fact that the concept of "unusual circumstances" has been applied in a variety of contexts shows that the isolated rulings of *Ray Brooks* and other cases that involve a different set of facts than the present matter are not controlling on what constitutes "unusual circumstances." The present case involves a situation that differs from *Ray Brooks* and *Universal Enterprises*,

<sup>&</sup>lt;sup>4</sup> The Counsel for the General Counsel's position in this matter is particularly troubling. The NLRB is tasked with protecting the rights afforded to employees under the NLRA, and therefore, any argument that employees' feelings and concerns about the union is "not relevant" enough to be heard by an ALJ would be contradictory to the Counsel for the General Counsel's duties and obligations.

and therefore, what would constitute "unusual circumstances" in the present case would be different than what constitutes "unusual circumstances" in *Ray Brooks*, or any other case with a different set of facts. Therefore, as the Board noted in *Universal Enterprises*, in order to determine whether "unusual circumstances" existed in the present case, "an examination of the facts of [this] case" is necessary. In other words, it was erroneous for the ALJ to rule that evidence from employees regarding they signed a union-disaffection petition did not arise under "unusual circumstances" without even hearing such evidence because it was contrary to the Board's ruling in *Universal Enterprises*.

In addition, while the ALJ may have felt that such evidence would not constitute "unusual circumstances," the ALJ is not the final decision maker. In essence, the ALJ prevented this Board from reviewing this case with a complete record and making its own determination of whether "unusual circumstances" existed in this case. At this juncture, this case involves an appeal based on an incomplete record. Therefore, this matter should be remanded to allow for the admissibility of evidence regarding whether the employees' union-disaffection petition arose in the context of "unusual circumstances."

# III. The Counsel For The General Counsel's Application Of The Totality Of Circumstances Standard For Collective Bargaining Is Incorrect

The Counsel for the General Counsel's arguments regarding whether Respondents bargained in good faith with the Union are completely incorrect. Specifically, although the General Counsel correctly argued that the "totality of circumstances" standard should be utilized to determine whether Respondents bargained in good faith with the Union, the Counsel for the General Counsel incorrectly focused on very specific and isolated incidents of Respondents' conduct in arguing that Respondents did not bargain in good faith. In addition, the Counsel for the General Counsel completely ignored the fact that Respondents bargained with the Union up

to the point where all but a few issues were remaining. Moreover, Respondents' position on the issues that were unresolved can hardly be seen as bad faith. Specifically, Respondents conducted hard bargaining on open shop, dues check-off, management rights and arbitration. As the Counsel for the General Counsel even agreed, the Respondents' positions on each of these issues did not constitute bad faith bargaining under Board law.

Therefore, under the totality of circumstances, Respondents did not bargain in bad faith.

### IV. An Order To Bargain For One Full Year Is Unwarranted

A one-year bargaining order is unwarranted and ill-advised for three reasons. First, as noted, Respondents bargained with the Union to the point where only a select few issues are left outstanding. Respondents met with the Union for 36 negotiation sessions, which spanned over the course of one year. During the time that Respondents bargained with the Union, the parties reached agreement on 170 different issues. Therefore, as the parties have clearly already engaged in lengthy bargaining and there are very few issues left to resolve, a full one-year extension — or renewal — of the bargaining period would be unwarranted under the Board's standards. See American Medical Response, 346 NLRB 1004 (2006)(In determining the length of extensions of certification, the Board considers factors such as the nature of violations; the number, extent and dates of collective-bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations).

Second, this Board must also consider the impact a one-year extension of the certification period will have on the Hotel employees. As noted earlier in this brief, as well as throughout these proceedings, the Hotel employees have made it clear they no longer want to be represented by the Union. As noted by the Board in *American Medical*:

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<sup>&</sup>lt;sup>5</sup> In addition, if this Board accepts the Counsel for the General Counsel's position that Respondents were the true employer during 2007, then under the Counsel for the General Counsel's own position, Respondents should be credited for bargaining with the Union for over two years.

Extension of the certification year essentially forecloses, for that extended period, the employees' exercise of their Section 7 right to reject the union or to choose <u>another</u> union. Because it has such a restrictive effect on the employees' central rights under the Act, the Board must act

with care and precision when asked to extend the certification year.

Based on such principles, the Board in American Medical rejected the Judge's decision to extend

the certification period for one year, and reduced the certification period to three months instead.

In the present case, the same principles apply. Not only have Respondents already

bargained in good faith with the Union for over one year and reached agreement on 170 different

issues, the present case also involves a situation where the employees have already rejected

Union representation. Therefore, this Board must consider the impact a one-year certification

period would have on the Section 7 rights of the Hotel employees. In considering their rights, it

is clear that a full one-year renewal of the certification period would be ill-advised.

Finally, as noted above, most of the unfair labor practice charges in this case must be

dismissed because Respondents were not found to be in a joint-employer, principle-agent or

successor employer relationship with PBHM during 2007. Therefore, regardless of whether or

not any of those unfair labor practice charges have any merit whatsoever, they must be dismissed

because they are flawed as a matter of law. Therefore, whatever unfair labor practices are

remaining, if any, would be insufficient to warrant a full one-year extension of certification.

DATED:

Honolulu, Hawaii, December 23, 2009.

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### UNITED STATES OF AMERICA

### BEFORE THE NATIONAL LABOR RELATIONS BOARD

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INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,	CERTIFICATE	OFSEDVICE
Union.	CERTIFICATE	OF SERVICE

### CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2009, the foregoing RESPONDENTS' REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO

RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION; CERTIFICATE OF SERVICE was electronically filed with OFFICE OF EXECUTIVE SECRETARY in Washington, D.C., and a copy of the same was hand delivered to:

Dale Yashiki, Counsel for the General Counsel Trent Kakuda, Counsel for the General Counsel National Labor Relations Board; SubRegion 37 300 Ala Moana Blvd., Room 7-245 P. O. Box 50208 Honolulu, Hawaii 96850

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DATED: Honolulu, Hawaii, December 23, 2009.

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